

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a  
Washington corporation,

Plaintiff,

v.

JOHN DOES 1-50 d/b/a Myauctionbiz.biz

Defendants.

No.

COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF

Plaintiff Microsoft Corporation ("Microsoft") brings this action against JOHN DOES 1-50 d/b/a Myauctionbiz.biz.

**I. JURISDICTION AND VENUE**

1. This is an action for violation of the CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.), the Washington Commercial Electronic Mail Act (RCW Ch. 19.190), the Washington Consumer Protection Act, and other state and federal causes of action. Microsoft seeks damages and injunctive relief to remedy defendants' unauthorized use of Microsoft's computers and computer systems to send millions of misleading and deceptive unsolicited commercial e-mail messages, or "spam," in violation of federal and state law and Microsoft's policies.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because substantial part of the events or omissions giving rise to the claims pled herein occurred in the Western District of Washington.

5. Plaintiff Microsoft is a Washington corporation with its principal place of business in Redmond, Washington.

6. Microsoft is unaware of the true names and capacities of defendants sued herein as DOES 1 - 50 and, therefore, sues these defendants by such fictitious names. Microsoft will amend this complaint to allege their true names and capacities when ascertained. Microsoft is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Microsoft's injuries as herein alleged were proximately caused by such defendants.

PRESTON GATES & ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 knowledge of those actions, provided assistance and benefited from those actions, in whole or  
 2 in part. Each of the defendants was the agent of each of the remaining defendants, and in  
 3 doing the things hereinafter alleged, was acting within the course and scope of such agency  
 4 and with the permission and consent of other defendants. Each of the defendants knew, or  
 5 consciously avoided knowing, that other defendants had or would engage in a pattern or  
 6 practice that violated the CAN-SPAM Act of 2003.

### 7 **III. NATURE OF MICROSOFT'S INTERNET E-MAIL SERVICES**

8 8. Microsoft owns and operates interactive computer services that enable its  
 9 customers to, among other things, access the Internet and exchange electronic mail ("e-mail")  
 10 on the Internet. Microsoft owns and maintains computers and other equipment, including  
 11 specialized computers or "servers" that process e-mail messages and otherwise support its e-  
 12 mail services. Microsoft maintains this equipment in Washington and California, among  
 13 other states. E-mail sent to and from Microsoft's customers is processed through and stored  
 14 on these computers. Microsoft is an internet service provider ("ISP"), a provider of "Internet  
 15 Access Service" as defined by 15 U.S.C. §7702(11), and an "interactive computer service" as  
 16 defined by RCW 19.190.010. Microsoft's computers and computer systems are "protected  
 17 computers" under 15 U.S.C. § 7702(13) and 18 U.S.C. § 1030(e)(2).

18 9. One of Microsoft's services is "MSN Hotmail" which provides free and  
 19 subscription based e-mail on the Internet through a web-based e-mail service that can be  
 20 accessed at www.hotmail.com. MSN Hotmail allows account-holders to exchange e-mail  
 21 messages with any other e-mail user who has an Internet e-mail address throughout the world.  
 22 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail  
 23 addresses ending in "@hotmail.com."

24 10. Another of Microsoft's services is "MSN Internet Access" (referred to herein  
 25 as "MSN") which provides free and subscription-based e-mail services that can be accessed  
 26 on the web or via Microsoft's proprietary network. MSN allows account-holders to exchange

1 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the  
 2 world. MSN has millions of registered accounts, whose users all have unique e-mail  
 3 addresses ending in “@msn.com.”

4 **IV. SPAM AND THE PURPOSES BEHIND THE FEDERAL CAN-SPAM ACT AND**  
 5 **THE WASHINGTON COMMERCIAL ELECTRONIC MAIL ACT**

6 11. The United States Congress, in passing the CAN-SPAM<sup>1</sup> Act of 2003,  
 7 concluded that “[u]nsolicited commercial e-mail, commonly known as ‘spam’, has quickly  
 8 become one of the most pervasive intrusions in the lives of Americans.” Indeed, Congress  
 9 estimated that by the end of 2003, if not sooner, spam would account for over 50% of all e-  
 10 mail. This is in sharp contrast to two years earlier when spam only accounted for 8% of all e-  
 11 mail. Congress has concluded that the rate at which spam is increasing is “reaching critically  
 12 high levels.” In fact, in 2003, an estimated 2 trillion spam messages were expected to be sent  
 13 over the Internet.

14 12. In addition to plaguing recipients by its sheer volume, spam is also notoriously  
 15 deceptive in form and content. In April 2003, the Federal Trade Commission found that 66%  
 16 of all spam contains “some kind of false, fraudulent, or misleading information, either in the  
 17 e-mail’s routing information, its subject line, or the body of its message.” In fact, the FTC  
 18 found that “one-third of all spam contains a fraudulent return e-mail address that is included  
 19 in the routing information (known as the ‘header’) of the e-mail message”. Congress found  
 20 that falsified headers “not only trick ISP’s increasingly sophisticated filters,” but also “lure  
 21 consumers into mistakenly opening messages from what appears to be people they know.”

22 13. Congress also found that not only do spammers use false sender information,  
 23 but they also use false or misleading subject lines. According to Congress, the FTC found  
 24 that 42% of spam contains misleading subject lines that “trick the recipient into thinking that  
 25

26 <sup>1</sup> CAN-SPAM is an acronym for “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003”.

1 the e-mail sender has a personal or business relationship with the recipient.” Congress  
2 provided examples of this type of false or misleading subject line: “Hi, it’s me” and “Your  
3 order has been filled.”

4 14. The economic impact of spam is enormous. Congress noted that a 2001  
5 European Union study found that “spam costs Internet subscribers worldwide \$9.4 billion  
6 each year.” Congress also noted that the estimated costs “to United States businesses from  
7 spam in lost productivity, network system upgrades, unrecoverable data, and increased  
8 personnel costs, combined, will top \$10 billion in 2003.” Of that amount, approximately \$4  
9 billion will be associated with lost employee productivity.

10 15. With these findings as a backdrop, the United States Congress passed the  
11 CAN-SPAM Act. In so doing, Congress provided four specific purposes of the Act: “(i)  
12 prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or  
13 promotional purposes from deceiving intended recipients or Internet service providers as to  
14 the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give  
15 recipients an opportunity to decline to receive future commercial e-mail from them and to  
16 honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also  
17 include a valid physical address in the e-mail message and a clear notice that the message is  
18 an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting or  
19 permitting the promotion of, their trade or business through e-mail transmitted with false or  
20 misleading sender or routing information.”

21 16. As Congress recognized, the growth in unsolicited commercial electronic mail  
22 imposes significant monetary costs on providers of Internet access services that carry and  
23 receive such mail, as there is a finite volume of mail that such providers can handle without  
24 further investment in infrastructure. The sheer volume of spam is threatening to overwhelm  
25 not only the average consumer’s in-box, but also the network systems of Internet access  
26 service providers.

1           17.     Washington State has likewise responded to the threat posed by spam. In  
 2     enacting the Commercial Electronic Mail Act, RCW Ch. 19.190, in 1998, Washington  
 3     became one of the first states to regulate spam. The Act recognizes that the spamming  
 4     practices prohibited by the Act are “matters vitally affecting the public interests” and are  
 5     unfair and deceptive practices which have a significant negative impact on Washington  
 6     businesses and consumers.

7           18.     Microsoft has invested substantial time and money in efforts to protect itself  
 8     and its equipment from spam and the spammers who promote and profit from spam, as well as  
 9     in efforts to protect its registered users worldwide from receiving spam.

10          19.     Microsoft has a clearly articulated policy prohibiting the use of its services for  
 11     junk e-mail, spamming, or any unsolicited messages (commercial or otherwise). Microsoft’s  
 12     policies also prohibit automated queries of any sort, harvesting or collection of e-mail  
 13     addresses, and any use of the services that is not personal and non-commercial. These  
 14     policies are included in the Terms of Use for MSN and MSN Hotmail, which can be accessed  
 15     via a clearly marked link on www.msn.com, as well as on the home pages for each of the  
 16     services.

## 17                               **V. DEFENDANTS’ UNLAWFUL CONDUCT**

18          20.     Microsoft is informed and believes, and on that basis alleges, that defendants  
 19     have been—and are currently—involved in widespread spamming by sending misleading,  
 20     deceptive and unsolicited commercial e-mail to MSN Hotmail account holders.

21          21.     Microsoft is informed and believes, and on that basis alleges, that defendants  
 22     own or operate a number of Internet domains associated with websites that promote the sale  
 23     of kits that train persons how to “Earn HUGE Profits On eBay.” Those domain names  
 24     include, but are not limited to: <29jfen.info>, <4rfv.info>, <awwicnd.info>, <bbccdde.biz>,  
 25     <ccddee.biz>, <cmrirugh.info>, <cnzcnie.info>, <cunfh5h.info>, <djenis.info>,  
 26     <dkenis.info>, <ebayvideo.net>, <ensie.info>, <fdnxir0of.info>, <fsj03.info>, <ghjbnm.biz>,

1 <lewndixj.info>, <iwenudh.info>, <jjlsdse.info>, <jjlsdse.info>, <kseiodn.info>,  
 2 <lfeins.info>, <lmvieux9.info>, <lsdkne.info>, <lsense.biz>, <Lwenisz.info>,  
 3 <mesncje.info>, <mnsdfh.info>, <msenieje.info>, <myauctionbiz.biz>, <Neufh.info>,  
 4 <nfdvijsd.info>, <nidueh.info>, <nvndsj.info>, <oiukjh.info>, <powenei.biz>,  
 5 <powndiz.info>, <pwemicu3.info>, <qpkds.info>, <qxsubfg.info>, <rtyfgh.biz>,  
 6 <slinendi.info>, <Slknseis.info>, <slvcei.info>, <Sneihz.info>, <svniejf.info>, <vfrbgt.biz>,  
 7 <vnjicd.info>, <weniez.info>, <wersdf.biz>, <woiejf.info>, <Wuwensd.info>,  
 8 <xhjwien.info>, <xnsidh4h.info>, and <xswcde.biz>.

9 22. Microsoft is informed and believes, and on the basis alleges, that defendants  
 10 have sent millions of commercial e-mail messages to its MSN and MSN Hotmail service that  
 11 contain those, and other, domain names advertising defendants' products.

12 23. Many of those commercial e-mail messages are sent through open proxies, or  
 13 hijacked computers, thereby disguising the true sender of the e-mail messages. The use of  
 14 open proxies or hijacked computers misrepresents or obscures the point of origin or  
 15 transmission path of the e-mails and renders the headers materially false and materially  
 16 misleading.

17 24. Many of defendants commercial e-mails include Microsoft's <hotmail.com> or  
 18 <msn.com> domain names in the "From:" header to falsely suggest that the messages were  
 19 sent from, or through, Microsoft's servers. Defendants do not have permission to use  
 20 Microsoft's domain names in this manner, and the use of Microsoft's domain names in this  
 21 manner misrepresents or obscures the point of origin or transmission path of the e-mails and  
 22 renders the headers materially false and materially misleading.

23 25. Many of defendants' commercial e-mails use the domain names of innocent  
 24 third-parties, including but not limited to the domain names <aol.com>, <att.net>,  
 25 <earthlink.net>, and <yahoo.com>. Microsoft is informed and believes, and on that basis  
 26 alleges, that defendants did not have permission to use those domain names, and the use of

1 those domain names misrepresents or obscures the point of origin or transmission path of the  
2 e-mails and renders the headers materially false and materially misleading.

3 26. Many of defendants' commercial e-mails contain falsified or "spoofed"  
4 Internet Protocol addresses, including Internet Protocol addresses assigned to Microsoft. The  
5 use of such IP addresses misrepresents or obscures the point of origin or transmission path of  
6 the e-mails and renders the headers materially false and materially misleading.

7 27. Many of defendants' commercial e-mails lack a valid physical postal address  
8 of the sender and lack clear and conspicuous identification that the message is an  
9 advertisement or solicitation.

10 28. Many of defendants' commercial e-mails have false or misleading information  
11 in the subject line or subject heading, such as: "Auction completed successfully" or "I will  
12 remember you." Many messages contain a first name in the subject line, such as "Shelby," or  
13 "Jayson." The use of such subject lines are likely to mislead a recipient, acting reasonably  
14 under the circumstances, about a material fact regarding the contents or subject matter of the  
15 message.

16 29. Microsoft has been adversely affected by defendants' actions. As a result of  
17 defendants' activities, Microsoft's computer equipment and servers were required to process  
18 millions of improper spam e-mails, as well as "bounce back" e-mails which had been sent by  
19 defendants to non-existent, out-dated or incorrect e-mail addresses. This significant number  
20 of e-mails has taken up substantial amount of Microsoft's finite computer space, threatens to  
21 delay and otherwise adversely affect MSN Hotmail subscribers in sending and receiving  
22 legitimate e-mail, and has resulted in and continues to result in significant costs to Microsoft.

23 **COUNT I**  
24 **(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and**  
25 **Marketing Act of 2003—"CAN-SPAM" (15 U.S.C. § 7704(a)(1)))**

26 30. Microsoft realleges paragraphs 1-29 of this Complaint as if fully set forth  
herein.



1           31. Defendants initiated the transmission, to protected computers, of commercial  
2 e-mail messages that contained, or were accompanied by, header information that is  
3 materially false or materially misleading.

4           32. Defendants' actions were willful and knowing.

5           33. As a result of defendants' actions, Microsoft has been damaged in an amount  
6 to be proven at trial.

7           34. Defendants' actions violated 15 U.S.C. § 7704(a)(1), and entitle Microsoft to  
8 injunctive relief, statutory damages and aggravated damages under 15 U.S.C.  
9 § 7704(g)(3)(C)(i)-(ii) because of defendants' willful and knowingly violation of the CAN-  
10 SPAM Act and because defendants knowingly relayed or retransmitted commercial e-mail  
11 messages that were unlawful under 15 U.S.C. § 7704(a) from a protected computer or  
12 computer network that they had accessed without authorization.

13  
14                                   **COUNT II**  
15           **(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and**  
16           **Marketing Act of 2003—"CAN-SPAM" (15 U.S.C. § 7704(a)(2) and (5))**

17           35. Microsoft realleges paragraphs 1-34 of this Complaint as if fully set forth  
18 herein.

19           36. Defendants engaged in a pattern or practice of initiating, to protected  
20 computers, commercial e-mail messages that:

21                   a) contained subject headings that defendants knew, or reasonably should  
22 have known, were likely to mislead a recipient, acting reasonably under the  
23 circumstances, about a material fact regarding the contents or subject matter of the  
24 messages;

25                   b) failed to contain a functioning return e-mail address or other Internet-  
26 based mechanism, clearly and conspicuously displayed, that a recipient could use to  
submit a reply e-mail message or other form of Internet-based communication

1 requesting not to receive future commercial e-mail messages from that sender at the e-  
2 mail address where the message was received; and

3 c) failed to include a clear and conspicuous identification that the message  
4 was an advertisement or solicitation, failed to provide a clear and conspicuous notice  
5 of the opportunity to decline to receive further commercial electronic mail messages  
6 from the sender; or failed to provide a valid physical postal address of the sender.

7 37. Defendants' actions were willful and knowing.

8 38. As a result of defendants' actions, Microsoft has been damaged in an amount  
9 to be proven at trial.

10 39. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and  
11 entitle Microsoft to injunctive relief, statutory damages and aggravated damages under 15  
12 U.S.C. § 7704(g)(3)(C)(i)-(ii) because of defendants' willful and knowingly violation of the  
13 CAN-SPAM Act and because defendants knowingly relayed or retransmitted commercial e-  
14 mail messages that were unlawful under 15 U.S.C. § 7704(a) from a protected computer or  
15 computer network that they had accessed without authorization.

16  
17 **COUNT III**  
**(Trespass to Chattels)**

18 40. Microsoft realleges and incorporates by this reference each and every  
19 allegation set forth in paragraphs 1 through 39 above.

20 41. The computers, computer networks and computer services that constitute  
21 Microsoft's MSN Hotmail e-mail system are the personal property of Microsoft.

22 42. Defendants were aware that their actions were specifically prohibited by  
23 Microsoft's Terms of Service and/or were on notice that Microsoft did not authorize their  
24 actions in any way.

25 43. Defendants have knowingly, intentionally and without authorization used and  
26 intentionally trespassed upon Microsoft's property.

1           44. As a result of defendants' actions, Microsoft has been damaged in an amount  
2 to be proven at trial.

3  
4                                   **COUNT IV**  
                                  **(Conversion)**

5           45. Microsoft realleges and incorporates by this reference each and every  
6 allegation set forth in paragraphs 1 through 44 above.

7           46. Defendants have willfully interfered with and converted Microsoft's personal  
8 property, without lawful justification, as a result of which Microsoft has been deprived of  
9 possession and use of its property.

10          47. As a result of defendants' actions, Microsoft has been damaged in an amount  
11 to be proven at trial.

12                                   **COUNT V**  
13                   **(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and**  
                                  **the Washington Consumer Protection Act (RCW Ch. 19.86))**

14          48. Microsoft realleges and incorporates by this reference each and every  
15 allegation set forth in paragraphs 1 through 47 above.

16          49. Defendants initiated the transmission, conspired with one another to initiate the  
17 transmission or assisted in the transmission of commercial e-mail messages from a computer  
18 located in Washington and/or to an e-mail address that they knew, or had reason to know, is  
19 held by a Washington resident. Those commercial e-mail messages:

20           a) used Microsoft's or another third party's internet domain names without  
21 permission;

22           b) misrepresented or obscured information identifying the true point of origin or the  
23 transmission path of a commercial electronic e-mail message; or

24           c) contained false or misleading information in the subject line.

25          50. As a result of defendants' actions, Microsoft has been damaged in an amount  
26 to be proven at trial.

1 51. Defendants' actions violated RCW § 19.190.020, and entitle Microsoft to  
2 actual damages or statutory damages of \$1,000 per e-mail, whichever is greater.

3 52. Defendants' actions affected the public interest, are unfair or deceptive acts in  
4 trade or commerce and unfair methods of competition, and violated the Washington  
5 Consumer Protection Act, RCW Ch. 19.86. Microsoft is entitled to treble damages and an  
6 award of its attorneys' fees and costs under that Act.

7  
8 **COUNT VI**  
**(Violation of the Lanham Act – 15 U.S.C. § 1125(a))**

9 53. Microsoft realleges and incorporates by this reference each and every  
10 allegation set forth in paragraphs 1 through 52 above.

11 54. Defendants used the designations "msn.com" and "hotmail.com," which  
12 incorporate Microsoft's registered trademarks and service marks, are words, terms, names, or  
13 combinations thereof, used in interstate commerce in connection with goods and services.

14 55. Defendant's conduct constitutes intentional and willful infringement of  
15 Microsoft's registered trademark and service mark and unfair competition.

16 56. Defendants' conduct is likely to cause confusion, mistake, or deception as to  
17 defendants' affiliations, connection, or association with Microsoft, or as to the origin,  
18 sponsorship, or approval of their goods or services, or commercial activities.

19 57. Microsoft has been damaged by these acts in an amount to be proved at trial.  
20 Microsoft is also entitled under the Lanham Act to injunctive and equitable relief against  
21 defendants.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Microsoft respectfully requests that the Court enter judgment against  
24 defendants, jointly and severally, as follows:

25 1. That the Court issue temporary and permanent injunctive relief against  
26 defendants, and that defendants, their officers, agents, representatives, servants, employees,

1 attorneys, successors and assignees, and all others in active concert or participation with  
2 defendants, be enjoined and restrained from:

- 3 a) establishing any accounts with Microsoft's MSN or MSN Hotmail  
4 services;  
5 b) using Microsoft's computers and computer systems in connection with  
6 sending commercial e-mail messages;  
7 c) making unauthorized use of Microsoft's computers, computer systems,  
8 or intellectual property;  
9 d) continuing to violate Microsoft's Terms of Service;  
10 e) continuing to violate the CAN-SPAM Act of 2003, or the Washington  
11 Commercial Electronic Mail Act; and  
12 f) assisting, aiding, or abetting any other person or business entity in  
13 engaging in or performing any of the activities referred to in subparagraphs a) through  
14 e) above.

15 2. That the Court award Microsoft actual damages, liquidated damages and  
16 statutory damages, in amount to be proven at trial;

17 3. That the Court award Microsoft its attorneys' fees and costs incurred herein;  
18 and

19 4. That the Court grant Microsoft such other or additional relief as is just and  
20 proper.

21 DATED this 27th day of October, 2004.

22 PRESTON GATES & ELLIS LLP

23  
24 By 

David A. Bateman, WSBA # 14262

Theodore J. Angelis, WSBA #30300

Attorneys for Plaintiff  
Microsoft Corporation